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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

IN RE: BLUECROSS BLUE SHIELD ANTITRUST LITIGATION (MDL NO. 2406)	)	**Master File No. 2:13-CV-20000-RDP**
	)	**This document relates to all cases.**

PROVIDER PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY REGARDING DEFENDANTS' MOTION TO DISMISS

The United States Court of Appeals for the Eighth Circuit recently issued an opinion that undermines the Blues' arguments in support of dismissal here and that provides additional support for the statements that the Court made at the hearing that the motion was premature. In *D&G, Inc. v. SuperValu, Inc. (In re Wholesale Grocery Products Antitrust Litigation)*, No. 13-1297 (8th Cir. May 21, 2014) (attached as Exhibit A), a small grocery store in Iowa alleged that the two largest grocery wholesalers in the country entered into a geographic asset exchange in which one agreed not to compete in New England if the other would agree not to compete in the Midwest. Slip op. at 2. The grocery store moved for summary judgment, claiming that this allocation of geographic markets was a *per se* violation of Section 1 of the Sherman Act. *Id.* at 6. Looking solely at the written terms of the wholesalers' non-compete agreement and not their actual conduct, the district court denied summary judgment and assumed that because the record did not establish an undisputed *per se* violation, the rule of reason necessarily applied. *Id.* at 9. On appeal, the Eighth Circuit held that the district court had made two errors. First, the district court ignored evidence that despite the written terms of their agreement, which theoretically allowed competition for certain customers, the wholesalers had not competed in each other's regions at all. *Id.* at 10. Second, the district court wrongly concluded that because the

undisputed facts did not prove a *per se* violation, the wholesalers were entitled to summary judgment under the rule of reason. *Id.* at 12. The Eighth Circuit held that a "genuine and material factual dispute prevents summary judgment as to whether a *per se* violation occurred." *Id.* If a jury were to find that "the wholesalers' real agreement involved dividing territory and customers along geographic lines," the court held, "then the wholesalers committed a *per se* antitrust violation." *Id.* at 11 (citing *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49 (1990); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972)).

The Eighth Circuit's opinion demonstrates that it is inappropriate to hold on a motion for summary judgment that the *per se* rule does not apply to a horizontal market allocation, when the defendants' behavior is a disputed factual issue. *Id.* at 9–12. For the same reason, it would be even more premature to hold on a motion to dismiss that the Blues' horizontal market allocation is not a *per se* violation, as the Blues advocated in their brief, (Doc. 120 at 24–44), and at the April 9 hearing. If the Provider Plaintiffs' allegations are taken as true, there is no way to conclude at this point that the Blues' conduct must be measured by the rule of reason.

The Eighth Circuit also implicitly rejected two arguments that the Blues make here: that the *per se* rule does not apply to a horizontal market allocation that is "ancillary" to procompetitive activities, and that *Topco* no longer represents the Supreme Court's view of the *per se* rule. (Doc. 120 at 31–33, 36–38.) In an earlier opinion, the district court had left open the possibility that the rule of reason would apply if the wholesalers' agreements not to compete were "ancillary . . . in the sense that they were necessary to protect the value of the assets being exchanged and realize economic integration." *In re Wholesale Grocery Prods. Antitrust Litig.*, 722 F. Supp. 2d 1079, 1094 (D. Minn. 2010). The Eighth Circuit mentioned this holding, slip op. at 6, but stated without qualification that if the wholesalers divided "territory and customers

along geographic lines," then they "committed a *per se* antitrust violation," *id.* at 11 (citing *Topco*). By relying on *Topco* and foreclosing the wholesalers' "ancillary" argument, the Eighth Circuit showed that *Topco* is alive and well, and that supposed procompetitive benefits cannot rescue a horizontal market allocation from the *per se* rule.

Dated: June 2, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 2nd day of June 2014, electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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